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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DOUGLAS A. CLARK AND CHERYL CLARK
Petitioners,
v.
CITY OF HERMOSA BEACH and CITY COUNCIL OF THE CITY OF HERMOSA BEACH
Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California Second Appellate District, Division One

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

The National Association of Home Builders ("NAHB") and the Building Industry Legal Defense ("BILD") Foundation have received the parties' written consent to file this brief as amici curiae in support of the petitioner and have filed the letters of consent with the Clerk of the Court.

I. THE INTERESTS OF THE AMICI CURIAE ARISE FROM THEIR MEMBERS' CONCERNS AS TO THEIR ABILITY TO OBTAIN JUDICIAL REVIEW OF ACTIONS WHICH INVOLVE THE USE OF LAND

The NAHB represents over 190,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the right of its members to use their land and, when their right to use land is unduly interfered with by local governmental actions, to seek judicial review of those actions.

The NAHB has been before the Court as an amicus curiae or as "of counsel" to the property owner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon,* 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986), *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987)[1], and *Dolan v. City of Tigard,* 512 U.S. 374 (1994).

The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of Southern California, a constituent part of the NAHB, whose 1,400 members include a significant number of residential developers and associate businesses that take part in building 70% of all new residential units annually in the Southern California region.

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[1] The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

The amici curiae submit their amici curiae brief in support of the petitioners in the present case in order to assist the Court in determining whether to grant its writ of certiorari to determine if the property protected by the Fifth and Fourteenth Amendments to the Federal Constitution inheres in the ownership of land or if, as asserted by several of the federal circuits and the state courts which have begun to follow those circuits, the existence of a protected property right in the use of land exists only when government has no discretion with respect to that use.

II. SUMMARY OF THE ARGUMENT

The federal and state courts are in massive conflict as to whether an owner of land—real property—who seeks governmental approval for the use of that land has a property interest protected by the Due Process Clause of the Fourteenth Amendment as a result of that ownership or whether a protectable property interest arises only when the governmental agency involved has no discretion with respect to granting the approval sought. This is an important question because, if a landowner has no protected property interest, he or she has no constitutional right to notice or hearing, fair procedures, nor substantively reasonable decisions, i.e., decisions which are not arbitrary or capricious. Even where courts have found the existence of the requisite property interest, there is disagreement amongst federal and state courts as to what level of review—how arbitrary or capricious the governmental action can be—the landowner is entitled to.

This Court, and this Court alone, can answer the questions of federal law presented by the petitioners because the federal courts of one circuit are not bound to follow the decisions of those in another and state courts are not bound to follow those of any lower federal court. Thus, until this Court speaks, the result of any attempt by a landowner to seek relief for a claimed violation of the Due Process Clause will turn on the fortuity of

where the land is located and whether the landowner's lawyer files in state or federal court. This is no way to interpret a provision of the United States Constitution.

III. THERE ARE MASSIVE CONFLICTS BETWEEN FEDERAL AND STATE COURTS

Article I of the Fourteenth Amendment prohibits the States from depriving anyone of property without due process of law. This Court has held that the use of land is an aspect of property. *Henneford v. Silas Mason Co.,* 300 U.S. 577, 582 (1937). The ownership of land, a term synonymous with real property, *see,* the definition of real property given in Black's Law Dictionary, 1218 (6th ed. 1990), with its concomitant right of use, would appear to be precisely the type of property interest protected by the Fourteenth Amendment. This Court has said precisely that:

> "The right of the [landowner] to devote its land to any legitimate use is property within the protection of the Constitution." State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928).

Nevertheless, many federal and state courts have adopted a rule of interpretation which holds that there is no property interest in the land use context protected by the Due Process Clause as long as the governmental agency responsible for granting a land use approval has any discretion in the granting or conditioning of that approval.

One of the primary purposes for which this Court uses its certiorari jurisdiction is to resolve conflicts amongst federal and state courts. *Braxton v. United States,* 500 U.S. 344, 347 (1991), and Rule 10 of the Rules of the Supreme Court of the United States. It is hard to conceive of a situation where the conflict amongst federal and state courts could be more widespread than that found in the land use context as presented by the current petition for certiorari.

A. There Are Conflicts Between Different Federal Circuits As To When A Protected Property Interest Exists In The Land Use Context.

A number of decisions from several circuits have held that the property interest protected by the Fourteenth Amendment inheres in the ownership of land and the right to its use subject, of course, to reasonable regulation. *Blanche Road Corp. v. Bensalem Township,* 57 F.3d 253, 268 n.15 (3d Cir.), cert. denied,—U.S.—, 116 S.Ct. 303 (1995); *DeBlasio v. Zoning Board of Adjustment,* 53 F.3d 592, 600-601 (3d Cir.), cert. denied,—U.S.—, 116 S.Ct. 352 (1995); *Riverpark, Inc. v. City of Highland Park,* 23 F.3d 164, 165-166 (7th Cir. 1994); *Polenz v. Parrott,* 883 F.2d 551, 556 (7th Cir. 1989); and *Harris v. County of Riverside,* 904 F.2d 497, 503 (9th Cir. 1990) (citing and quoting from *State of Washington ex rel Seattle Title Trust Co. v. Roberge,* 278 U.S. 116 (1928)).

On the other hand, there are a number of cases from a number of other circuits which have held that a property interest arises in the land use context only where the governmental body responsible for approving the desired land use has no discretion; that is, where the landowner has shown a "legitimate claim of entitlement" as opposed to a "mere expectancy." These cases stand for the proposition that the Due Process Clause does not apply in the land use context and that the landowner must look elsewhere—to state law—for protection against actions taken without notice or hearing, pursuant to unfair procedures, or, substantively, in an arbitrary and capricious manner. *Norton v. Village of Corrales,* 103 F.3d 928, 931-932 (10th Cir. 1996); *Crowley v. Courville,* 76 F.3d 47, 51-52 (2d Cir. 1996); *Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 378-379 (2d Cir. 1995); *Triomphe Investors v. City of Northwood,* 49 F.3d 198, 201-203 (6th Cir.), cert. denied,—U.S.—, 116 S.Ct. 70 (1995); *Sylvia Development Corp. v. Calvert County,* 48 F.3d 810, 825-828 (4th Cir. 1995); *Zahra v. Town of Southold,* 48 F.3d 674, 679-682 (2d Cir. 1995); *Acierno v. Cloutier,* 40 F.3d 597, 616 (3d Cir. 1994); *Orange Lake Associates, Inc. v. Kirkpatrick,* 21

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It should also be noted that there are differences amongst the appellate panels in a single circuit and sometimes even in a single case. Thus, the Ninth Circuit has come down squarely on both sides of the question, holding that the property interest was in the ownership of land for the purposes of analyzing a procedural due process claim in *Harris v. County of Riverside, supra*, after looking at the existence of a "legitimate claim of entitlement" when analyzing a procedural due process claim in *Parks v. Watson, supra*. Further, in *Bateson v. Geisse, supra*, the Court of Appeals found a substantive due process violation without analyzing the property interest involved, 857 F.2d at 1303-1304, while finding no procedural due process violation

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[2] The majority opinion held bound by previous Second Circuit decisions to apply the "legitimate claim of entitlement test instead of simply recognizing the owner's indisputable property interest in the land he owns ..." 870 F.2d at 917-918.

because of the absence of a "legitimate claim of entitlement." 857 F.2d at 1305.

It is not clear whether the same problem has arisen in the Third Circuit. In *Acierno v. Cloutier, supra,* the Court of Appeals, sitting en banc, cited the Second Circuit test requiring the demonstration of a "legitimate claim of entitlement" in the context of deciding an immunity issue based on a substantive due process violation claim. 40 F.3d at 616. On the other hand, the Third Circuit has been extremely clear in holding that the ownership of the land is the protectable interest. *Blanche Road Corp. v. Bensalem Township, supra,* and *DeBlasio v. Zoning Board of Adjustment, supra.*

This kind of conflict—among circuits, between courts in the same circuit, and sometimes even in the same opinion—requires resolution by this Court.

B. A Number Of State Courts Are Now Applying The "Legitimate Claim Of Entitlement" Test.

A number of state courts have found violations of the Due Process Clause in the land use context. However, they have generally done this without analyzing the precise property interest involved. See, e.g., *Sundheim v. Board of County Commissioners,* 904 P.2d 1337, 1346 (Colo.App. 1995)(open question in Colorado as to what the protected property interest is), aff'd, 926 P.2d 545 (Colo. 1996); *Bakken v. City of Counsel Bluffs,* 470 N.W.2d 34, 38-39 (Iowa 1991); *Rivkin v. Dover Township Rent Leveling Board,* 143 N.J. 352, 363-380, 671 A.2d 567, 573-582, cert. denied,—U.S. —, 117 S.Ct. 275 (1996); *Moongate Water Co., Inc. v. State,* 120 N.M. 399, 404-405, 902 P.2d 554, 559-560 (1995); *Bartlett v. Cinemark U.S.A., Inc.,* 908 S.W.2d 229 (Tex.App. 1995); and *Lutheran Day Care v. Snohomish County,* 119 Wash.2d 91, 117, 117-125, 829 P.2d 746, 758-763 (1992).

Some state courts have discussed the two possibilities as to what constitutes a protectable property interest and have then come down on the side of the "legitimate claim of entitlement"

test. *Kelley Property Development, Inc. v. Town of Lebanon,* 226 Conn. 314, 320 n.11, 321-322, 627 A.2d 909, 913 n.11, 914 (1993); and *Electro-Tech, Inc. v. H.F. Campbell Co.,* 433 Mich. 57, 77 n.22, 114-118, 445 N.W.2d 61, 70 n.22, 87-89 (1989), cert. denied, 493 U.S. 1021 (1990).

Finally, a number of state courts have adopted the "legitimate claim of entitlement" test without even referring to the possibility that the protectable right might lie in the ownership of land. *City of Buford v. Ward,* 212 Ga.App. 752, 756, 443 S.E.2d 279, 283 (1994); *Security Management Corp. v. Baltimore County,* 104 Md. App. 234, 245-249, 655 A.2d 1326, 1331-1333, cert. denied,—U.S.—, 116 S.Ct. 917 (1995); *Rosenfeld v. Board of Health,* 27 Mass.App.Ct. 621, 627, 541 N.E.2d 375, 379 (1989); *Boulder City v. Cinnamon Hills Associates,* 110 Nev. 238, 246, 871 P.2d 830, 325-326 (1994); *Town of Orangetown v. Magee,* 88 N.Y.2d 41, 52, 665 N.E.2d 1061, 1068, 643 N.Y.S.2d 21, 28 (1996); and *Fairmont Township Board of Supervisors v. Beardmore,* 431 N.W.2d 292, 295 (N. Dak. 1988).

C. Federal And State Courts Are In Conflict As To What Constitutes The Proper Standard Of Review.

Even in those courts which recognize the possibility that actions taken by a governmental body in the land use context may violate the Due Process Clause, there is still substantial conflict as to what the proper standard of review is. As pointed out in the petition for certiorari at 23-24, it is bad enough that there are conflicts between circuits and amongst the states, but it is intolerable that the results may turn on which court—federal or state—a complaint is filed in. In California, as demonstrated by the case under consideration, a landowner who files a complaint in state court alleging a violation of the Due Process Clause will be forced to face the "legitimate claim of entitlement" test and then demonstrate that the action by the governmental body shocks the conscience. On the other hand, by filing in a district court in the Ninth Circuit, the ownership of land will be sufficient, *Harris v. County of Riverside, supra.*

In New Mexico, a landowner apparently has a property interest by virtue of ownership of land but can prevail only if he or she can convince the state court that the governmental action "shocks the conscience." *Moongate Water Co., supra,* 120 N.M. at 404, 902 P.2d at 559. On the other hand, the Tenth Circuit uses the "legitimate claim of entitlement" test but analyzes the validity of a claim that the Due Process Clause has been violated to determine whether the governmental action complained of was "arbitrary and capricious." *Jacobs, Visconsi & Jacobs, supra,* 927 F.2d at 1119.

Finally, for some unknown reason, state courts located in the Third Circuit are in disagreement with the Circuit Court of Appeals. In *Rivkin v. Dover Township Rent Leveling Board, supra,* the New Jersey Supreme Court adopted the "shocks the conscience" test and then stated:

> "We acknowledge that the standard that we adopt today may be contrary to the more expansive interpretation given the Due Process Clause by many circuit courts, which have found that 'arbitrary or irrational' government actions deny substantive due process rights. See, e.g., *De Blasio v. Zoning Bd. of Adjustment,* 53 F.2d 592, 593 (3d Cir.) . . ." 143 N.J. at 368, 671 A.2d at 576.

The concurring opinion in *Anselma Station, Ltd. v. Penoni Associates, Inc.,* 654 A.2d 608 (Pa.Cmwlth 1995), is similar:

> "The Third Circuit may want district courts to sit often as super zoning hearing boards by hearing Section 1983 actions with jury trials in some cases, but I don't believe this court or the common pleas courts want to assume that role." 654 A.2d at 620.

IV. ONLY THIS COURT CAN RESOLVE THE CONFLICTS AMONGST FEDERAL CIRCUITS AND STATE COURTS

Decisions by a court of appeals in one federal circuit are not binding upon the courts in another circuit. *Generali v.*

D'Amico, 766 F.2d 485, 489 (11th Cir. 1985). California follows the general rule that state courts are not bound by the interpretations of federal statutes by the lower federal courts. *Rohr Aircraft Corp. v. County of San Diego,* 51 Cal.2d 759, 764, 336 P.2d 521, 524 (1959), and 21 CJS, Courts, § 158, Decisions of United States Courts as Precedents in State Court. On the other hand, when this Court speaks, all lower courts, federal and state, must listen.

> "The determination by this court of [a federal] question is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding." *Chesapeake & O.R.R. v. Martin,* 283 U.S. 209, 221 (1931).

Until this Court speaks, the conflicts will continue and the uncertainty will remain.

V. CONCLUSION

The lower courts—federal and state—are crying out for a definitive statement as to the application of the Due Process Clause in the land use context.

> "'The lower courts' differing approaches to the treatment of substantive due process in these areas [land use] suggests the obvious need for Supreme Court clarification.' *Levinson, supra,* 16 U. Dayton L. Rev. at 18." *Rivkin, supra,* 134 N.J. at 371, 671 A.2d at 577.

See also *Anselma Station, supra,* 654 A.2d at 613:

> "The Supreme Court has not seen fit to visit the issue of what is required to properly allege a Section 1983 violation for deprivation of substantive due process."

Finally, in what can only be described as a masterful understatement, the Tenth Circuit stated:

> "There is some confusion in the law as to when a person has a property right in a [land use] context like that before us." *Norton v. Village of Corrales, supra,* 103 at 931.

This Court has to clear up that confusion and the petition now before the Court provides the perfect vehicle to do so. As it stands today, there are a number of courts which hold that the Due Process Clause does not provide protection in the land use context. This should not be the law but, if it is to be the law, then it should be stated by this Court.

Accordingly, the NAHB and the BILD Foundation ask that this Court grant Mr. and Mrs. Clark's petition for certiorari and remove the conflict, confusion, and uncertainty which currently exists.

DATED: March 12, 1997

Respectfully submitted,

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